President Container, Inc. *and* President Container Employees Association, Petitioner. Case 22–RC–11667

August 26, 1999

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on March 5, 1999, and the Regional Director's supplemental decision on objections and the hearing officer's report on objections.[1] The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 138 votes for the Petitioner, 65 votes for Production Workers Union Local 148, AFL–CIO (the Intervenor) and 7 votes against union representation, with 12 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings[2] and recommendations[3] only to the extent consistent with this decision.

The hearing officer recommended overruling the Intervenor's Objection 17, which alleged that the Employer's owner, Marvin Grossbard, interfered with the election by announcing to gathered employees that he would not deal or negotiate further with the Intervenor, which was the incumbent union. We find merit in the Intervenor's exception to this recommendation.[4]

The pertinent facts are as follows. On the eve of the election, the Employer and the Intervenor conducted a bargaining session in an effort to negotiate a successor contract to the expired contract. This meeting took place in front of an estimated 25 to 40 employees. The employees were present upon the Intervenor's suggestion, because the Intervenor wanted to dispel rumors that it was not adequately representing the employees. According to Grossbard, one of the employees became upset and asked why the employees were not getting more money. Grossbard then got up and said: "If that's the position of [Local] 148 and if that is the position of the employees, I'm not going to negotiate any further." Grossbard then left the room.

The hearing officer found that Grossbard's conduct was a sham, staged to create a built-in objection in case the Petitioner won the election. On the basis of Grossbard's demeanor as a witness and his 30-year bargaining experience, the hearing officer concluded that he was not prone to such emotional outbursts. She also relied on the fact that the parties signed an indefinite contract extension after Grossbard made the statement.

Contrary to the hearing officer, we find that Grossbard's conduct requires the election to be set aside. The refusal to bargain with an incumbent union is a serious violation that can cause employees to become disenchanted with that union. See *Caterair International*, 322 NLRB 64, 67 (1996). The result of refusing to bargain with the incumbent union is to "discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether." *Karp Metal Products Co.,* 51 NLRB 621, 624 (1943). This result is magnified when, as in this case, the refusal to bargain is stated in front of a large gathering of employees. See *MK Railway Corp.,* 319 NLRB 337, 343 (1995). Thus, Grossbard's public and dramatic refusal to negotiate with the incumbent union would foreseeably cause it to lose employee support. In addition, we note that the refusal to bargain with the Intervenor occurred on the eve of the election, and that the contract with the Intervenor was not signed until after the election.

We do not take issue with the hearing officer's concern that Grossbard's conduct may have been intended to furnish the basis for an objection should the Petitioner win the election. In election cases involving more than one union, when one of the unions prevailed, the Board has declined to set elections aside on the basis of objectionable conduct by employers that was directed either at the prevailing union or at both unions. As the Board has recognized, to sustain objections based on such conduct would condone collusion. It would suggest to any employer that favored a union whose prospects in an election appeared dim that the employer could engage in objectionable conduct that would enable the favored minority union to successfully file objections and receive another chance in a second election. See, e.g., *Packerland Packing Co.*, 185 NLRB 653, 654 (1970); *Showell Poultry Co.*, 105 NLRB 580 (1953). *Maple View Manor, Inc.,* 319 NLRB 85 (1995).

Here, however, Grossbard's refusal to bargain was not directed at both unions or at the prevailing Petitioner, but

[1] The Regional Director's supplemental decision deals with the Intervenor's Objections 1–4, 6–10, 3, and 18. The hearing officer's report deals with the Employer's Objections 1 and 2 and the Intervenor's Objections 5, 11, 12, 14–17, and 19.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

The Intervenor contends that the hearing officer's findings and conclusions demonstrate bias and prejudice. On careful examination of the hearing officer's report and the entire record, we are satisfied that the Intervenor's contentions are without merit.

[3] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the Intervenor's Objections 11, 12, and 19 be overruled and the Regional Director's finding that the Intervenor's Objections 2, 3, 4, 6–10, 13, and 18 be overruled.

[4] Because we are setting aside the election on the basis of the conduct that was the subject of Objection 17, we find it unnecessary to pass on the other exceptions to the Regional Director's findings and the hearing officer's recommendations besides those that we adopt pro forma.

solely at the Intervenor, which was the losing party. Of course, it is not beyond imagination that the Intervenor could have colluded with the Employer to manufacture an election objection in this fashion. Had such collusion been shown, this would be a different case; we would not allow a party to profit from its own misconduct. On the record before us, however, we cannot find that the Intervenor played any role in orchestrating Grossbard's statement and walkout.[5] Thus, even assuming that the Employer had a hidden agenda in engaging in objectionable conduct, there is no evidence that the Intervenor was anything other than an injured party. In similar circumstances, the Board has sustained objections based on employer conduct that was directed at the losing party in a election involving more than one union. See, e.g., *Concourse Nursing Home,* 230 NLRB 916, 919 (1977) (distinguishing *Packerland Packing* and its progeny).

For the foregoing reasons, we find that Grossbard's conduct interfered with the employees' free choice in the election, and therefore the election must be set aside.

[Direction of Second Election omitted from publication.]

[5] The hearing officer found that the contract extension signed after the election was evidence that Grossbard's earlier refusal to bargain was a sham. However, the contract extension does not necessarily suggest that the Intervenor had anything to do with Grossbard's prior conduct.